Bargaining With the Devil

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BOOK REVIEWS

BARGAINING WITH THE DEVIL


Reviewed by Robert W. Gordon\(^2\)

I. INTRODUCTION

This fascinating (if sometimes irritating) book records a Pilgrim’s Progress of a law student and his imperilled soul through a forest thick with dangers and temptations. It is Richard Kahlenberg’s account of how he — just barely! — survived three years of Harvard Law School (HLS) classes, extracurricular activities, and jobs searches without, in the end, going to work for a corporate law firm. From his present perch of safety as a staff assistant to United States Senator Charles S. Robb, Kahlenberg (HLS class of 1989) offers this memoir of his perilous journey as a guidebook and cautionary tale for the law students who follow him, and as a meditation and polemic on the briar patch of subtle pressures and incentives that make the path to public service so hard to travel.

Clearly, this difficulty is something that needs explaining. Kahlenberg points out that around seventy percent of entering HLS students say in their first year that they would like to practice some kind of “public interest” law (p. 5). The student political culture at the school is predominantly — sometimes stridently — left-liberal.\(^3\) Yet almost every graduate (some pausing for a year or two to clerk for a judge) eventually takes a job in corporate practice (p. 41). Kahlenberg wants to explain this mass metamorphosis — is it a betrayal? a conversion? — by explaining how it almost happened to him. He wants to know who or what is to blame — the law school faculty? the students themselves? the placement process? simple economic pressures? the general political culture? — and how a beginning might be made at reform. Above all, he wants to convey a feel for the phenomenology of the liberal student as he gradually turns corporate lawyer and how cynicism, resignation, cautious prudence, bad conscience, and the

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enthusiastic embracing of destiny all influence his changing aspirations and identity.

II. THE NARRATIVE

The "facts" (as a law student might render them if called upon in class to compress a complex narrative of experience into a handful of dry pellets) of Kahlenberg's memoir may be summarized as follows. Kahlenberg arrives at HLS in 1986, with ambitions for a career in public service and the belief that law school is the best preparation for such a career. His upper-middle-class background has taught him that the privileged should use their advantages to improve society and the situation of the less fortunate. Since writing his undergraduate thesis on Robert F. Kennedy, however, Kahlenberg has spiced this noblesse oblige ethic with a dash of "populism," by which he means not so much the mobilization of the masses, but rather the design of national policies that would address the needs and concerns of all the disenfranchised, including especially the white working-class Democrats who since 1968 have been seduced by conservatives who use racial, law-and-order, and patriotic appeals for votes.4

A. First Year

Faithful to the conventions of such law-school-as-boot-camp narratives such as One-L5 and The Paper Chase,6 Kahlenberg is humiliated and his self-esteem splintered when, on the very first day, he flubs a softball question when called upon in the "Experimental Section on the law," a class designed to impart an interdisciplinary perspective (pp. 11–13). Like many fellow students, he worries that the other sections are learning "real law" (doctrine),7 whereas his section is not. But at the same time, he discovers that most "real law" is extremely technical and tedious. Competition and anxiety over class performance (and ultimately exams) are demoralizing and demeaning, and bring out the worst in everyone.

Worst of all, to his surprise, is the political culture of the school. On race and gender issues many of his classmates assert rigidly "cor-

4 Interestingly, both his elitist view of duty and his inclusive populism will eventually put Kahlenberg at odds with many liberal and radical law school classmates.
7 "My roommate . . . would talk about fundamental, classic Civ Pro cases like Pennoyer v. Neff [, 95 U.S. 714 (1877)], which most people in my section didn't know existed" (p. 18). One can't help but wonder how folkloric myths of this kind — for example, that "black-letter doctrine" like Pennoyer is "fundamental" while a sociological description of litigation processes would be extraneous and "soft" — arise and are diffused throughout first-year culture. Wherever they come from, they act as serious obstacles to innovative teaching. Nevertheless, Kahlenberg's section does study Pennoyer in the spring (p. 52).
rect" left-wing positions (p. 25) without tolerating disagreement. The left wing (Critical Legal Studies) of the faculty is too skeptical about the legal system to inspire a student who hopes to use law to do good; the right wing (Law and Economics) is too complacent about the system's complicity with social inequality and suffering. Kahlenberg is most impressed by old-fashioned liberal centrists like Professors Archibald Cox and Philip Heymann, who are committed to working within the system for constructive change (p. 24). His recurring complaint about virtually all members of the faculty, however, is that whatever their politics, they seem indifferent and are practically inaccessible to the students. Ironically—even for students with public-policy ambitions such as Kahlenberg—the favorite first-term professor turns out to be a scoffer at idealism, the "street fighter and . . . successful litigator" David Rosenberg (p. 20) — a tough and irreverent professor who works hard with the students on real-world cases, an anti-elitist let loose among the elites.

Meanwhile, the summer job hunt arrives. Our hero stays with the rapidly dwindling number of students who still attend the meetings about public-interest jobs. He learns that summer jobs at high-profile organizations such as the Children's Defense Fund and NAACP Legal Defense and Educational Fund are very few in number and competitive to obtain. Most of the employers don't answer letters; even if a student receives a job offer, the pay is minimal or nonexistent. Furthermore, Kahlenberg and most of his classmates have been demoralized around this time by their first term grades. Like everyone else, our hero is used to being at the top of the pack; consigned to the middle of the class and thereby thrown off the "fast track," he becomes increasingly alienated and withdraws from academic life (p. 51). Moot Court teaches him primarily that he dislikes appellate argument (p. 57). Still driven to seek the top, however, he competes with 200 classmates to write his way into the Harvard Law Review, but is rejected (p. 64).

B. Second Year

Kahlenberg's second year mostly fortifies the views acquired in his first. The radical student leftists strike him as increasingly strident

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8 For example, Kahlenberg considers as "politically correct" the view that rapists should be held strictly liable whenever the woman claims that she did not in fact consent, regardless of the defendant's actual or reasonable knowledge of the victim's lack of consent (p. 25).

9 Kahlenberg himself eventually obtains a job with the U.S. Attorney for the Southern District of New York, but it offers no salary. Although some very modest summer fellowship grants are available for public-interest jobs, each requires a separate, tiresome application. Eventually, he receives $1,000. The job itself is a disappointment — little responsibility, some library work, and the realization that, with exceptions, most lawyers even in that office saw it as a "weigh-station [sic]" to more lucrative private practice (p. 69).
The professors he continues to admire are the liberal centrists who act on their convictions in the public realm: Susan Estrich and Christopher Edley, who are out working for the Dukakis Presidential campaign; Lawrence Tribe, who spearheads the opposition to the confirmation of Judge Bork and brings his inside-track knowledge to the Constitutional Law classroom; and the liberal journalist Anthony Lewis, who teaches an exciting Free Speech course (pp. 76–78). His “real law” courses are in discouraging in different ways. Tax is dull and taught by a socratic bully (pp. 125–29); Corporations, although taught by a sympathetic and interesting teacher (William Simon of Stanford) mainly concerns the uninteresting struggles between shareholders and managers (pp. 129–30); and even Poverty Law, taught by the charismatic Gary Bellow, has boring rules and offers influence only “on the margins” (p. 131). The great classroom experience of his second year is a seminar with the down-to-earth romantic Dr. Robert Coles" on “Dickens and the Law,” which uses Dickens’ novels as a means for talking about some of the things that most trouble the students — the dangers to character and conscience posed by their professionalization, the foggy alienated rhetoric of the law, and the way in which the playing out of legal roles seems to drain people of humanity, sympathy, and indignation at injustice (pp. 134–43).

But, of course, these classroom experiences are only the backdrop for the real drama of the second year: the job search. Kahlenberg decides, with some reluctance, that he will work for a firm during his second summer (p. 193). After all, everybody else, including the most vocal radicals, does it. The leftists find each other at the firm receptions or on the commuting shuttles; they are all dressed in suits, sometimes exchanging embarrassed glances, more often wholly unembarrassed (pp. 99, 114). He begins an interesting project of casual research, finding out how liberal lawyers in firms reconcile their political convictions with their professional lives. He finds some who seem able to do everything: “bright, friendly, sensitive, liberal corporate lawyers . . . working within the system, doing progressive things after hours, and positioning themselves to be tapped should a liberal Democratic governor or President choose to do so . . .” (p. 101). He finds this image powerfully seductive, but its appeal is weakened by

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10 Two examples cited by Kahlenberg of the left’s intolerance are their support of a protest that prevented Nicaraguan contra leader Adolfo Calero from speaking (pp. 78–79), and the furor caused in class and echoed in a cruel law school newspaper cartoon over Professor Charles Nesson’s suggestion that so-called “Rape Shield” laws might be constitutionally impermissible (pp. 79–84).

11 Professor Coles returns the compliment by writing the foreword to Broken Contract (pp. ix–xi).
other informants who insist that adding *pro bono* on top of law practice means having to work twice as hard as everyone else and completely dispensing with family or personal life (p. 114).

Ultimately, he accepts a summer job at Ropes & Gray in Boston, for two rather odd reasons. First, the firm is prestigious and he, like other law students, ranks firms by reputation (p. 115). Second, "[b]ecause Ropes made little pretense of being a progressive firm, there was also little danger of a liberal like me being coopted into a permanent position" (p. 115). Once at the firm, he elects to work in trusts and estates because it has the best hours (p. 145), and not surprisingly finds the work "uninteresting but not particularly 'bad guy.' The estates research generally decided which wealthy party would get the money" (p. 147).

By the end of the summer, I had come to believe that most high-priced attorneys did not wear white hats or black hats: they wore no hats at all. They just came to work every day to do jobs that were of little social importance. They had no "cause" to get excited about — which is why lunches and money became paramount (p. 155).

**C. Third Year**

Kahlenberg's third year plays variations on themes that are already strongly established. He takes a course from the famous radical professor Duncan Kennedy, but finds much of it "incomprehensible, affected, abstract and theoretical" (p. 165). He criticizes the course's cynical view of the law and the possibility of using the law to improve the world and finds the course devoid of practical proposals. He much prefers Paul Weiler's course on Labor Law, "a real area of law without revolutionary expectations" (p. 169), which is committed to realistic reforms; Gary Orren's Kennedy School of Government course on the media and the 1988 election (p. 172), which engages Kahlenberg's fascination with policy issues far more deeply than most of his Law School courses; and Alan Morrison's litigation workshop, taught by a visiting well-known public advocate, a "progressive, a practitioner, . . . a nice guy," and a dedicated lawyer who takes on big, interesting cases (p. 177). Best of all, Morrison doesn't work for a firm. In the spring, Kahlenberg repeats the formula: a straight law course in copyright that bores him silly; an exciting course on Election Law with Susan Estrich, a real-world veteran (p. 211); another Kennedy School course on the media (p. 213); Legal Ethics; and a third-year paper with Alan Dershowitz, whom he admires for his active concern with issues of fairness and morality (p. 209).

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12 The last seems a rather perverse complaint to bring against a course in legal history.
Once more, however, the big drama has to do with Kahlenberg's job search, which now approaches a climax. He remains torn: should he join a firm now to use it as a springboard for public-minded policy work later? Or should he try to go directly into the public sector? Certainly, the path of least resistance (and greatest temptation) leads to the firms. For one thing, his grades have dramatically improved and it would be easy for him to get job offers from good firms. By contrast, the search for a job on Capitol Hill involves a litany of frustrations and dead ends; even law school and public-policy school graduates with the most impressive credentials must hang around offices, take part-time jobs as waiters, and hope for auditions like "out-of-work actor[s]" (p. 221). Unlike the immense polished job recruitment machines at the elite school placement offices, which whisk students efficiently along the conveyor belts from schools to firms, there are no regular career channels to the public sector. Almost everyone—friends, classmates, trusted advisors—urge him to take a job with a firm. He is offered a job with Covington & Burling, a prestigious Washington D.C. firm, with many partners who have public-policy experience and credentials. He is told that, by working for a firm, he will keep his options open, sharpen his mind, brighten his résumé, and position himself optimally for the big public-job break when it comes (that is, when the Democrats once again control the empire of federal executive patronage). But something keeps nagging him in his many interviews with liberal lawyers at the firms. That something (I am interpolating a judgment here, because Kahlenberg's own views are not entirely explicit) seems to be that liberal lawyers in corporate practice can't really reconcile their public-service ambitions with the work they do for clients. The ideology and the jobs just don't seem to mesh. Just as the Covington deadline is about to expire, he accepts an offer to join Senator Robb's staff (pp. 231–33).

Kahlenberg ends by lamenting that so many of the nation's best and brightest law students forswear their idealism to take jobs working for interests in which they don't believe and that they don't even find interesting. He calls for a restructuring of social and legal institutions "in order to make it a little easier to do good" (p. 235). In particular, Kahlenberg suggests the establishment at the presidential level of a domestic peace corps for professionals to help "remove the impediments to public service— the low status, the problem of educational debt, the timing of recruitment, the lack of training opportunity" (p. 236). To give graduates what they want (even more than money), the program should be "highly selective and given high visibility," and recruit high-profile professionals to serve as mentors (p. 236).

13 Or used to, anyway, before the current downturn in the job market.
III. SOME PROBLEMS WITH THE BOOK

Earlier, I described Kahlenberg's memoir as both fascinating and irritating. The book is of undeniable interest to anyone like myself who inhabits one of the worlds it describes (the elite law school), knows many of the people described, and wonders how that world and those people look to the students we teach. Above all, I fully share his concern about the drainage of so many bright, highly educated, and (at least at one stage of their lives) idealistic people into corporate practice. Plainly, he is right to say that the major law schools, whatever their loftier ambitions (and despite the efforts that administrations and faculty at most of them have been making toward diversifying their students' careers), have come to serve the primary function of selecting, sorting, and then channeling the nation's top college graduates into a single, narrowly focused institution: the large metropolitan law firm. There, the considerable energy and intelligence of these graduates are (quite literally) exhausted in work of extremely debatable social utility. Naturally, one wants to know how we arrived at this situation, whether it's as worrisome a situation as Kahlenberg (among many others including Derek Bok) thinks it is, and what—if anything—can be done about it. The book does make a contribution to that understanding, it offers insight into those questions, and it is easy to read due to its breezy and engaging style.

A. Self-Indulgence

Yet it is also easy to find Broken Contract annoying. Some of Kahlenberg's gripes seem merely self-indulgent: complaints that the world has failed him by inadequately promoting his own priorities and self-esteem. Much of his disillusionment with law simply comes from his boredom with its technical detail; and although a student might legitimately reproach her teachers for failing to integrate the details with larger policies and social visions, detail itself is an important part of the study and practice of law. No degree of commitment to public service is going to change that. In his odyssey through law firms, Kahlenberg's lack of interest in law is so intense that he doesn't even try to find out what corporate lawyers do (p. 201). When his teachers try to fit the detail into a larger theoretical

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14 See Edward B. Fisher, President of Harvard Brands Legal System Costly and Complex, N.Y. TIMES, April 22, 1983, at A1 (reporting on former Harvard President Derek Bok's claim that the legal profession is often characterized by the “massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture or the enhancement of the human spirit”).

15 Nor, one might add, will a commitment to legislative policy. Kahlenberg will not last very long in the policy-making world unless he is willing to get down into the tedious technical detail.
Kahlenberg is particularly bitter about the lack of personal attention and encouragement from his teachers, a common problem at HLS with its shockingly low faculty-student ratio (around 70 tenured and tenure-track faculty for over 1700 students). Although this is a real and serious problem, it largely stems from something that Kahlenberg most values about the school: HLS professors are so active in public causes that they can bring their commitment and insiders’ knowledge to the classroom. Although his teachers didn’t give him much time in office hours, professors such as Tribe, Heymann, Edley, Weiler, and Estrich gave him a unique exposure to high-level public-interest practice and policy analysis; some of them wrote recommendations (pp. 122–23) and used their connections to help get him a job (pp. 219). That is the Harvard trade-off, and surely almost every student who decides to go there rather than a small school like Yale or Stanford or Chicago is aware of it: Harvard is big, impersonal, alienating and indifferent to students, but, as Kahlenberg says, it gives you an “engraved invitation to join the Liberal Establishment” (p. 182) — and the Conservative one too.

Kahlenberg complains about how hard it was for him to find a public job for both his first summer and for after graduation — the path of idealism, he rightly maintains, should not be so thorny. Kahlenberg, however, was after the elite jobs that everyone wanted and often competed with experienced lawyers who were refugees from

16 Throughout the book, Kahlenberg exhibits a set of attitudes that is pervasive among American law students and the larger legal culture: the anti-elitism of the elites and the anti-intellectualism of the intelligentsia (although, as already mentioned, he tempers his occasional anti-elitism with a recognition of elitism’s “benevolent fruit” of social duty) (p. 165). In other words, people who have prized and fought for elite status all of their lives will respond to appeals that they should use their education and high positions to exercise some social leadership with shocked denials: any attempt to promote their views would constitute “elitism.” In their view, it is somehow not elitist to have the privileges, money, and power that comes with their status; it is elitist, however, to deploy those advantages for the common or public good. Similarly, students who have aced their way through college by mastering complex academic disciplines, and who will readily master the most arcane technical systems of legal doctrine (such as the corporate tax rules) for an exam, will often balk at learning the tiniest bit of social theory or social science to help them understand a policy problem on the ground that it’s “too theoretical and abstract.” Over time, I’ve come to see the standard complaint on student evaluations, “Too theoretical and abstract” as simply code for, “It’s hard; it would clearly take some work to understand this; and now that I’ve left college and am in professional school, I only work hard at things that have obvious vocational relevance.” An intellectual interest in law is also another of the many casualties of the grading-and-sorting system of the first year: after the first term, many people who end up below the top of the class lose interest in intellectualizing their perspective on the material; they leave that to the grade-certified intellectuals, the possible future law teachers, and the class nerds. Rebelling against the way in which they have been sorted, they find a new solidarity with the “real world” practitioners’ contempt for the theoreticism of their teachers.
corporate practice. Had his "populism" less to do with the top-down
design of national policies and more to do with grass-roots experi-
mentation (where much of the most interesting and important liberal
action has been in the last decade\(^{17}\)), he might well have found a
niche that would have satisfied his ambitions to be of constructive use
in a state, local government, or regional public-interest office. Fur-
thermore, it is not always possible to take the central drama of the
book — will Richard Kahlenberg save himself from corporate prac-
tice? — entirely seriously. After all, Kahlenberg's decision involved
nothing more than his first job, and not his career.\(^{18}\) Although many
elite law graduates take corporate law jobs, they also leave them in
droves after a few years\(^{19}\) for business, teaching, smaller firms, or
public service. It is impossible to tell the whole of this story by
looking at people fresh out of law school with debts to pay and facing
all the other social pressures that Kahlenberg describes.

\section*{B. Lack of Social Context}

Anyone who hopes to find in this book an explanation for the
mass defection of young lawyers from their public-service ambitions,
will find Kahlenberg's analysis fairly thin. He rarely leaves the topic
that he is most comfortable with — the phenomenology of the law
student — to search for the more general causes of the mass change
of heart among young lawyers. He does not have a very rich view
of the social and historical context of this problem.\(^{20}\) He points to
the huge (and growing) gap between corporate salaries and public-
sector or public-interest salaries. He points to the fact that firms offer
jobs to HLS students on a platter — with expensive meals and hotels
and flattery and attention (best of all for students starved for personal
encouragement) — whereas the public sector job search requires a lot

\(^{17}\) See, e.g., HARRY C. BOYTE, HEATHER BOOTH & STEVE MAX, CITIZEN ACTION AND THE
NEW AMERICAN POPULISM 27-188 (1986); HARRY C. BOYTE, COMMONWEALTH: A RETURN
TO CITIZEN POLITICS 81-157 (1989); Mary Joe Frug, A Postmodern Feminist Legal Manifesto
(An Unfinished Draft), 105 HARV. L. REV. 1045, 1067-72 (1992) (describing the grass-roots anti-
pornography campaign).

\(^{18}\) Although the first job is not inconsequential. A combination of inertia, tunnel vision, and
a growing affinity for the good things in life might keep a person on the treadmill to partnership
long after he had intended to get off. Retirement might bring only the empty feeling of regret
at a life having passed by without the finding of any vocation.

\(^{19}\) See LEONA M. VOGT, FROM LAW SCHOOL TO CAREER: WHERE DO GRADUATES GO AND
WHAT DO THEY DO? 28-32 (1986) (describing a survey indicating that the typical length of
stay of HLS graduates in their first jobs is two to five years and that the vast majority of
graduates change career at least once).

\(^{20}\) In this respect, his book is not nearly as good as another memoir of a young HLS graduate,
written in 1991. See THOMAS GEGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FAIR
TO LABOR WHEN ITS FLAT ON ITS BACK (1991). Which Side Are You On describes the situation
of labor lawyers in modern times and thoroughly explores its general historical contexts and
causes.
of initiative and is often fruitless. He mentions the devaluing of government and public service by recent Presidents — by contrast with the glamor and excitement imbued by Kennedy’s New Frontier.21 These explanations, however, fall short of the mark.

1. Failure Without. — Since the 1960s and 1970s, there have been considerably fewer public-service opportunities available to liberal policy-activists like Kahlenberg. Recent administrations haven’t just “de-valued” such opportunities; they have aggressively tried to eliminate them for political reasons. There once was a glamorous and highly selective job corps for young lawyers: the OEO Legal Services program.22 Unfortunately, the Nixon, Reagan, and Bush Administrations have all tried to gut the program, and have partially succeeded.23 They also tried (albeit unsuccessfully) to challenge the tax exemptions of foundations that funded public-interest firms; many foundations ultimately lost interest in public-interest law anyway.24 More significantly, the same administrations have deliberately driven out many liberal idealists from once congenial federal agencies like the Civil Rights Division of the Justice Department, EPA, OSHA, the NLRB, and the FTC. The largest employer of liberal activists in this century outside the government has been the labor movement, which has now shrunk to a tiny fraction of its former size and influence; other large-scale magnets for idealism — great popular mobilizations such as the civil rights, welfare rights, and farm workers’ movements — have almost disappeared altogether. Some new causes such as environmentalism, abortion rights, international human rights, lesbian and gay rights, elderly rights, and disability rights are actually flourishing (compared to their influence twenty years ago), but not on such a scale as to employ many lawyers. Kahlenberg’s own cause, the promotion of class-based policies that cut across divisions of race, gender, and religion for the benefit of generally worse-off people, has no political constituency, no mobilized movements, and no institutionalized pressure groups; it only has the hope that the New Deal coalition can be revived around issues such as health care and education.

2. Failure Within. — Even without broad-based popular support, liberal activists have sometimes found among certain elite groups the willingness and energy to initiate and pursue the reforms that are often achieved by means of quiet influence within elite institutions. Sometimes reform may simply take the form of persuading conservative elites to acquiesce more gracefully to demands made upon them.

21 Consequently, he proposes a presidentially-created, professional, public-service corps as a cure.
22 Legal Services also had many offshoots, such as California Rural Legal Assistance (CRLA).
23 See Nan Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond 14-21 (1989).
by popular mass movements (for example, integrating their businesses, hiring more women in managerial positions, recognizing unions, becoming environmentally conscious, and the like); but it may also take the form of activism with respect to policies that lack much popular support or interest (for example, constructing international peace or monetary institutions; restructuring Social Security; promoting public investment in postwar Europe, post-Communist Russia, or New York City; protecting the civil liberties of radicals, and the like). In the past, American lawyers have been preeminent among the elites who have contributed to these varieties of policy activism. The possibility of working within the system at a high level for constructive change has thus naturally made the legal profession attractive to people who would like to preserve or improve their own class position and make a comfortable living, while simultaneously using their advantages to influence social change. This is the very vision of a role within the "Liberal Establishment" that induced Richard Kahlenberg, along with many others, to apply to law school.

(a) Corruption of the Firms. — The problem with the liberal-activist-from-within-the-elite-profession vision, in the present day, is that it has been compromised, perhaps irrevocably, by the current generation of managers of the principal elite law firms. If this vision is not already obsolete, it is in grave danger of becoming so. Part of the damage to the vision was done before these managers came on the scene; the prestige of the liberal policy establishment was diminished by Vietnam, the influence of the establishment was reduced by competition from new elites in the far west and southwest, and the liberals have been kept out of national office so long that they have lost the habit of moving in and out of government. But the most serious damage to elite policy activism has been inflicted by the recent restructuring of law practice around the frantic hustle for the bottom line. There are many reasons for this well-documented phenomenon. Corporate law practice has probably become more streamlined and efficient as well as somewhat more diverse in gender, race, and ethnic composition. But the obsessive pursuit of profit in the new competitive environment tends to drive out virtually all other objectives that the law firms might prefer to have: a broad and diverse client base, interesting work, collegiality, mentoring of associates, and,

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importantly, time and opportunity for involvement in public causes — not as an occasionally pleasant supplement to a money-making practice, but as one of the main purposes for the very existence of the firm. As Kahlenberg found in his interviews, there are still firm lawyers who do this kind of public work. These attorneys, however, are under tremendous pressure to keep their billable hours up or lose their place in the firm. Moreover, because it is so important not to displease any clients (actual or potential), firms often discourage partners and associates from participation in public activities about which clients might not like to hear. The irony is that public-interest work, one of the main attractions of becoming an elite lawyer and the one that still operates as a major force in attracting people to law school, is vanishing in the actual life of the profession. Law firms are still cruising on the reputations they earned from partners who became famous for serving as secretary of state, chair of the crusading state investigatory commission, chief drafter of a set of regulatory statutes or uniform state laws, or vocal defender of the rights of the despised or helpless. If a modern lawyer, however, took the time to do the kinds of things that the older lawyers did to get their portraits impressively displayed on the walls of their firm's reception area, she would be fired. Law firms are like those once bohemian neighborhoods in which the artists who created their appeal can no longer afford to live.

(b) Demise of the Corporate Counsellor. — There is yet another casualty of this restructuring of law practice: the ideology of the corporate lawyer as the responsible counsellor who does not simply tell the clients what they can get away with, but rather tries to persuade them to adopt corporate policies that will comply with the general norms and purposes of the legal system and that will benefit society as a whole. Although clients may disregard the advice, according to the ideology, part of being a lawyer is to give such advice and to use one's influence to make it effective. Lawyers do not necessarily have privileged insights into morality; rather, as outsiders to their clients' businesses, they may often be less parochial with respect to the social vision and values of their profit-seeking clients. The counsellor not only helps the client negotiate its way though the legal system, but also educates the client about the policies and purposes behind the law and encourages the client to comply. The counsellor also mediates between the client, the state, and other constituencies such as unions, local communities, or the general public. As a policy activist who designs regulatory frameworks, the counsellor tries to work toward policies that will reconcile the client's interests optimally with general social benefits. It is quite unclear whether cor-

27 For fuller accounts of this vision of the corporate counsellor, see Robert W. Gordon,
porate lawyers have ever lived up to this ideal of the counsellor-in-law-legal-and-social-responsibility. It is clear, however, that this ideal was, until recently, a standard part of the self-image and general belief system of the corporate bar, and therefore probably had some effect on practice. This ideal is embodied, for example, in the ABA's Model Code of Professional Responsibility and was widely reported among the Wall Street lawyers studied by Erwin Smigel in 1964. It is also clear, unfortunately, that in the last decade most traces of this admirable ideology have vanished, except among retiring lawyers. Recent studies of corporate lawyers have explicitly commented on the disappearance of this ideology, which Kahlenberg's book confirms: of the many liberal lawyers asked to reconcile corporate practice with social convictions, not one responded that corporate practice was an arena to pursue those convictions through responsible counselling.

3. Conclusion. — In short, both external and internal influences have increasingly disabled lawyers from playing the liberal-policy activist roles that were traditionally expected of them. Kahlenberg could not find the outlet for his energy and his idealism because the outlets are no longer there. If I am right about this, then Harvard Law School might not have played such a powerful role as Kahlenberg gives it credit for in *Broken Contract*.


Robert C. Clark, the Dean of Harvard Law School, evoked something like the vision of the corporate counsel in a recent speech on the social functions of corporate lawyering. See Robert C. Clark, Address at the Harvard Law School Leadership Dinner (June 14, 1991), in HAVR. L. BULL., Oct. 1991, at 5–7. In general, this seems a useful conception of the corporate lawyer's role, but I wonder whether Dean Clark realizes how far law firm managers have moved away from this ideal conception of their responsibilities or how strenuous a reform effort would be required to put the vision into practice.

31 In part, I believe this disappearance is a function of the increasing specialization of law firm work. However, there is some reason to believe that the locus of opportunities for responsible counseling has now shifted to the powerful and prestigious offices of in-house general counsel. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902–03 (1990); Gordon, supra note 27, at 281–84; Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L. J. 479, 484–90 (1991).
IV. SOME USEFUL LESSONS OF THE BOOK

Despite these omissions, Kahlenberg's book makes some valuable points. I do think he is right to suppose that the powerful HLS culture — competitive, arrogant, anxious, brutally judgmental, and dismissive — requires its inhabitants to develop an exceptionally tough exterior to protect against wounds to their self-esteem.

A. Humanity and HLS

A more humane environment would probably help foster the preservation of student idealism and intellectual curiosity. Even the modest step of making the first term, or first year, compulsory pass-fail, as Yale does, would do much to temper the gloom and alienation that settles over every entering class as soon as grades are received. It would help, too, if both the administration and faculty would use their many connections to try to institutionalize placement resources — like the ones in place for law firms, clinical internships, and judicial clerkships — that would provide readily accessible routes to federal, state, and local public jobs (although this is difficult, I realize, because these places do not know if they can hire until the last moment). The school could also do more to vary its output by varying its input; that is, HLS could recruit more students who might not have the traditional credentials, but who do have proven records of social altruism. However, as I have already suggested, the main determinants of the vocational dilemmas of public-minded lawyers lie outside the school and are as real for graduates of Stanford and Yale (where, on the whole, students feel very nicely treated) as for those of Harvard. As I suggest in more detail toward the end of this Review, the greatest contribution the schools can make to addressing these societal problems is to begin understanding them.

B. Everyman

Kahlenberg is also honest enough to present himself as an ordinary guy with ordinary motivations. Granted, he has a more tenacious commitment to his public-service ideals than the average law student, he has more courage and persistence in pursuing them, and he is surely more reflective and self-critical about his motivations than most. But much of the value of his account stems from its modesty; he presents himself as an everyman so we can see how the pressures and temptations to head for the firms are worked out in himself, among others. And he is particularly insightful and interesting with respect to the ways in which law students and lawyers come to rationalize their situation. He shows us how many ideological stances function simply as excuses for doing nothing. One stance, common across the political spectrum, is pervasive cynicism: nothing makes any differ-
ence, all work within the system is corrupt, all work outside it is futile; therefore, you might as well sell out and live comfortably, like everyone else. This cynicism, he remarks, is "convenient" (p. 231). Another disabling force, paradoxically, is the conventional left-liberalism of the student culture itself: following the correct line on issues of racial and gender politics and being militant about things that don't affect one's own life can serve as a substitute for action, like going to church on Sunday — "To be a liberal was easy: you could act one way and all that anybody really expected was that you continue to mouth the right words" (p. 153). Some radicals, on the other hand, insist upon such a rigid stance (as a condition of integrity and purity) that one could not follow them without renouncing all middle-class privileges; a lesser sacrifice or a more modest degree of commitment isn't enough.32

C. Rationalization

Kahlenberg is also caustically informative in reporting on his sample of lawyers who try to explain how they can be good liberals and

32 Kahlenberg sometimes carries this general point too far. At the end of the book, Kahlenberg says that the liberals on the HLS faculty sometimes "spent their extracurricular hours working for the types of interests liberals normally opposed — for Pennzoil and Michael Milken and Leona Helmsley" (p. 234), implying that they don't work for liberal causes. This implication is not only very unfair and inaccurate, it also contradicts the many detailed examples that Kahlenberg gives elsewhere in the book about HLS faculty involvement in liberal causes. He is even less fair and generous to the radicals, although he does note at the end that the leading student radical of his years, called "Luke Houghton," does not in the end betray his principles (though most do) and goes to work for California Rural Legal Assistance (p. 234). In making the point that the faculty radicals are too cynical to inspire students or to act on their own commitments, he says, "[w]hile the liberals were out fighting [Bork's nomination], Duncan Kennedy was busy writing dense pieces for publications like the Buffalo Law Review, pages few people read and even fewer understood" (p. 78). The reference is obviously to Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF. L. REV. 205 (1979). Kahlenberg's attack is pretty cheap: it's a sneer at scholarship (the anti-intellectualism of the intelligentsia again), and a sneer at Buffalo (a lower-status — though in fact excellent — school). It's also very unfair to Kennedy, as a very small amount of research would have discovered. Kennedy, as it happens, is a very politically active professor; when Kahlenberg was in law school, Kennedy participated energetically in the Harvard clerical workers' union-organizing campaign. He was then (and still is) very much involved in low-income housing policy reform and activism in the Boston area, and has written very concrete and practical work in that area. See Duncan Kennedy, The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence, 15 FLA. ST. U. L. REV. 485 (1987). He's also among the few members of the HLS faculty who devote a good deal of time and personal attention to students; a whole generation of radical scholars and activists are in debt to his personal attention and encouragement. As Kahlenberg himself says elsewhere (p. 84), personal attacks on people like Kennedy are often simply another strategy — a set of reasons for ignoring the disturbing substantive questions they raise.
He gets several kinds of answers. Some say candidly that they can't reconcile the roles, but are hoping for a democratic administration to get back into public life; others believe that they are more likely to be recruited for public interest positions from firms, because you have to "prove yourself in the private sector" first and because corporate law practice "sharpens the mind" like no other calling. Sometimes they say that one must make compromises — but, as Kahlenberg points out, eighty to ninety per cent of one's time goes beyond compromise because too little of value is given in exchange. The money is simply not enough; it's just a myth that corporate lawyers are highly paid. Legal salaries are only high if one assumes that those earning them place little or no value on their leisure time, family life, personal relationships, other forms of self-expression, and above all — on the activity that since classical times has been thought to be the highest form of self-expression — participation in public life. The usual answer is simply the separation of work from personality or politics: my work for clients is one thing, my personal and political life another (p. 139). Unfortunately, work is not neutral with respect to private life and politics; as a lawyer from the Los Angeles firm of O'Melveny & Myers told Kahlenberg, he was "supporting the system" through his work (p. 183). In fact, a lawyer in corporate practice is often precluded from engaging in a wide range of political activities, including those that might offend the firm's clients. As with law students, many practicing lawyers explain their life situations in standard ways that turn out to be reasons for not doing anything about them.

V. Conclusion

So there is something of value in this book, and there are many reasons to hope that lawyers, law students, and professors will read and learn from it. But I find the most disturbing aspect of the book in its major omission.

33 There might be a serious ethical problem with this survey. It's not at all clear that the lawyers surveyed knew that Kahlenberg was conducting it and that what they said might be made public with their names and their firms' names used. He claims that "virtually all of them were put on notice that I was writing a book" (p. xiii), but that is by no means the same as notice that what they told him might find its way into print. He protects his classmates through the use of pseudonyms.

34 This seems a most curious belief. Much of corporate practice is by now so specialized that it can only sharpen the mind, as Edmund Burke said of law, by narrowing it. Over the years, my impression of conversations with practicing corporate lawyers about matters of general intellectual interest has been that many seem to have lost much capacity for critically reflecting upon the world: their views are emphatically asserted, but usually wholly conventional. If these are the people who will be tapped for high policy positions, the tappers might be making a big mistake if they are looking for any social vision or imagination.
A. What is Public Service?

This is allegedly a book about people's career choices and how these choices serve or harm the public good. But, the book contains almost no discussion of the relation between law practice and the public good. Although Kahlenberg establishes a dichotomy between working for "large established firms" and working in "public service" or for the "public-interest," he makes almost no effort to define any of these terms. Neither do the lawyers in the book: none of them, at least as reported, have much understanding of the social effects of their work. A few offer platitudes: if they do transactions, they grease the wheels of commerce; if they do litigation, they represent interests who want representation. But even the lawyers who like their practice don't try to explain its social value; they hold attitudes such as, "It's exciting," or that the deals involve large sums of money, or "We eat well." (pp. 187-89). Kahlenberg himself has little to say on the subject, except that most of the work seems neither good nor bad, it just moves wealth around from one wealthy interest to another. The only sustained analysis in the book of the social meaning and effects of corporate law is made in an off-hand way by quoting a telephone message from a radical friend who asserts that it is merely a mechanism for increasing and reinforcing the concentration of wealth and power among the few (p. 145).

The problem here is obvious. How can Kahlenberg (or anyone else in a similar position) advise people to forego these jobs for more meaningful ones if he doesn't have any idea of what they do? More generally, how can all these law students who go into these firms do so on the basis of such little substantive knowledge of what it is they do? Surely this is exactly where knowledge is most needed — students need help in discriminating among firms and between firms and other job sites. The most important ethical and social choices a lawyer makes in her lifetime are the choices about what kind of work she will do and what kinds of interests for which she will work. One cannot afford to take an agnostic view of this matter. Yet as Kahlenberg notes, these choices are made and adhered to with incredible casualness. Lawyers just don't think much about the social effects

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35 His friend's cynical message:
Labor law is basically oppressing laborers. Estates and probate work is largely planning the estates of very wealthy individuals in the Boston area. Corporate and business law tends to be helping large corporations take over smaller corporation, and therefore leads to the oligopoly of the wealthy and basically screwing the workers over to make enough money to pay for the loans they have to take on, which lawyers negotiate, incidentally . . . . Real estate law involves helping large corporate developers buy up property at low prices, usually by using the mechanism of the state to rake in huge tax write-offs. . . . I think they're all equally enjoyable, you fascist pig. Bye-bye. (p. 145).

36 The casualness is reinforced by the standard legal-advocacy ideology that everyone is entitled to representation. This maxim provides good reasons for coming to the aid of people
of their own practices. If they generally approve of their clients, they just assume the practice is valuable; if (as it often happens) they have doubts about the work, they prefer not to inquire too closely. Yet surely it makes a huge difference depending upon what kinds of interests the lawyer serves and how she serves them. One might help clients who are small entrepreneurs to obtain venture capital for innovative technology, assist legislators in drafting more equitable tax laws, help a United States bank creditor renegotiate its loan with a Latin American country, build a settlement structure that will provide clients with adequate compensation and avoid expensive litigation, or help a client design an effective contractual process for the disposal of toxic waste. Or one might help clients to obtain capital for harmful new technology that corrodes the environment, advise wealthy individuals on avoiding the taxes that ordinary people have to pay, help a bank foreclose on its loan to a struggling country, deploy an arsenal of tactical litigation weapons to exhaust the resources of deserving plaintiffs, or help a client conceal its illegal disposal of toxic waste from the authorities.

Why, for example, is it more valuable for Kahlenberg to work in the "public sector" than for a firm? Without the necessary specific descriptions of lawyers' practices, it is hard to understand why working in the public sector would be more valuable, as Kahlenberg plainly thinks it would be. If, for example, his work helped large corporate interests avoid regulation (as many congressional aides do), then it would be very similar to much of corporate practice. If it involved mediating between the regulators and the corporation by persuading the regulators to redesign their policies to more flexibly accommodate the company's needs, that too is what many corporate lawyers do — or should do anyway. Why is one "public" and the other "private"? There is no sharp split, as all lawyers know, between rule design, which is what policy-makers supposedly do, and rule-implementation, which is what lawyers do. The life of the law is in the concrete ways it is applied, and lawyers are important transmitters of applications. What both the corporate lawyer and the congressional aide need in this situation is some substantive idea of whether the regulation at issue is a good one or a bad one. And that means being equipped with a set of substantive ideas and methods that will allow one to

who have trouble obtaining it or who are systematically unrepresented, and it provides even better reasons for working to build institutions that ensure universal access to justice. Sometimes it is also a good reason for not abandoning in midstream a client to whom one has already made a commitment. But it is not by itself a justification for those who claim to be consciously motivated to spend their careers in the service of clients who would have no problem finding other lawyers.
gain some perspective on the detailed tasks that one will be asked to perform in one’s life.

**B. A Modest Proposal**

This, it seems to me, is where law schools can help. Like Kahlenberg, I think it would be good if law schools paid more attention to issues of general public policy; that is, if they did more to serve the large number of students who have come for general training in a policy-oriented career. I also think that law schools should rigorously pursue whatever additional means they can find for diversifying the careers of their graduates. But above all, they need to equip their graduates with the capacity for critical evaluation of the jobs that they do; and because most graduates of elite schools go into corporate law, students should be taught how to evaluate the social meaning, effects, and value of corporate law\(^3\) (I do not mean to limit this to elite law schools and elite jobs; every school should study and evaluate the practices of its graduates). This means using — but going well beyond — economic studies of legal institutions (for example, one might look to sociological studies of the work that major law firms perform for their major clients). It means engaging in real political and ethical debates about what work is valuable and what is not.\(^3\)

A lawyer for Ropes & Gray told Kahlenberg at the end of his summer there: “‘If all these people — the vast majority of practicing lawyers — are doing something wrong, that’s quite an indictment of our system.’” (p. 155). Indeed. The scandal is that we have no idea whether what the vast majority of practicing lawyers are doing is wrong, wonderful, wasteful, or simply pointless; very little research or teaching addresses this subject; and there is hardly even a vocabulary with which to speak about it. Year after year, we keep shoveling students into the corporate law machine with only the dimmest notions of whether it does more good than harm.\(^3\) Nobody can expect an ultimate consensus to emerge from such inquiries, but still they

\(^3\) Astonishingly enough, after all these years, there is almost no literature on this subject. For a rare exception, see Ronald J. Gilson, *Value Added by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239, 303-06 (1984).

\(^3\) I am happy to see that in one area of practice, management-side labor law, law students have begun to make the necessary discriminations. In this instance, students distinguish between law firms that stay within ethical and legal boundaries in advising their corporate clients in labor conflicts and firms that collaborate with consultants in illegal “union-busting” tactics.

\(^3\) Lawyers sometimes protest that the effects of their work are so complex and ambiguous that they cannot hope to assess them coherently. Yet, actors in the legal system such as judges and administrators routinely evaluate complex consequences. Although they cannot predict the exact outcomes of their decisions, they still have to do what they think is best. For a full treatment of this point, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1683 (1988), which compares lawyers to judges in their dealings with complex judgements.
need to be made. As things stand, we batter our students' instinctive social moralities into fragments, leaving them in a moral fog without the skills to navigate their way out. We invite them to treat social and political decisions, which ought to be the subject of collective and public deliberation (however contentious), solely as issues of private conscience. We isolate them and put them at the mercy of the placement culture that Kahlenberg describes so well.